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IN THE

Supreme Court of the United States

October Term, 1970.

No. 718

DELAWARE VALLEY ARMAMENTS, INC.
Petitioner,

and

EDITH BISHOP, EMILLA COMOROTE, ELVA LOVE, DOROTHY PARKS, HELEN REYNOLDS, DONNA RIEBLE, JUANITA RUDOLPH, JENNY TREMPER, ANNA WEBBER and CAROLYN WERTS, Intervenors Individually and Representatives of Class

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

HENRY T. REATH,
ROLAND MORRIS,
STEVEN R. SHER,
DUANE, MORRIS & HECKSCHER,
100 South Broad Street,
Philadelphia, Penna. 19110
Attorneys for Petitioner.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

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Appendix.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DELAWARE VALLEY ARMAMENTS, INCORPORATED

Employer

AND

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO

Petitioner

CASE NO. 4-RC-7908

DECISION AND DIRECTION OF ELECTION.

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees at the Employer's Cherry Hill, New Jersey and Mt. Laurel, New Jersey plants, excluding all temporary, office clerical, professional, and technical employees, guards, and supervisors as defined by the Act.[1]

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or

1. The parties stipulated to the appropriateness of the unit.

been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[2] Those eligible shall vote whether (or not) they desire to be represented for collective bargaining purposes by

INTERNATIONAL UNION OF ELECTRICAL,
RADIO & MACHINE WORKERS, AFL-CIO,

[SEAL] /s/ BERNARD SAMOFF,
Regional Director, Region Four.

Dated August 29, 1968
at Philadelphia, Pa.

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2. An election eligibility list, containing the names and addresses of all the eligible voters, must be filed with the Regional Director within 7 days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, 1700 Bankers Securities Building, Juniper and Walnut Streets, Philadelphia, Pennsylvania 19107 on or before September 5, 1968. Under Board directives, no extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed: *Excelsior Underwear Inc.*, 156 NLRB 1236.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

DELAWARE VALLEY ARMAMENTS, INC.,

AND

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO

CASE NO. 4-RC-7908

SUPPLEMENTAL DECISION ON OBJECTIONS TO ELECTION AND DIRECTION OF SECOND ELECTION.

Pursuant to a Decision and Direction of Election issued on August 29, 1968, an election was conducted on December 12, 1968, under my direction and supervision, in the unit specified therein.

Copies of the Tally of Ballots were served on the parties immediately following the election. The Tally of Ballots showed the results of the election as follows:

Approximate number of eligible voters	339
Void Ballots	1
Votes cast for the Petitioner	93
Votes cast against participating labor organization	220
Valid votes counted	313
Challenged Ballots	9
Valid votes counted plus challenged ballots	322

Challenges are not sufficient in number to affect the results of the election.

The Petitioner filed and served timely Objections to the election. The Objections allege:

1. That the Employer as part of its unlawful anti-union campaign, unlawfully refused to supply and provide to the Regional Director an election eligibility list containing the names and addresses of all the eligible voters, preventing these names from being made available to the Union, the petitioner herein. The unlawful refusal to provide such a list substantially effected the outcome of the election.

2. The Employer unlawfully threatened to dismiss employees because of their activities on behalf of the Union.

3. The Employer unlawfully questioned the employees as to their Union adherence and affiliation and the Employer unlawfully coerced employees into refusing to permit their names and addresses to be placed upon an election eligibility list.

4. The Employer distributed and published inaccurate and false statements about the Union and its officers.

5. The Employer unlawfully discriminated against Union adherents by not assigning overtime to them.

6. The Employer compelled rank and file employees to distribute anti-union literature on company's premises while prohibiting Union adherents from distributing pro-union literature and from talking in favor of the Union on company premises.

7. During the election campaign employer unlawfully raised insurance benefits for employees in order to sway them to vote against the Union.

8. The Employer unlawfully promised the employees higher wages if they voted against the Union.

9. By these and other acts, all of which occurred subsequent to the filing of the petition and immediately prior to the election, the Employer violated the Act and prevented the holding of an election under the laboratory conditions required.

Pursuant to Section 102.69(c), NLRB Rules and Regulations and Statements of Procedures, Series 8, as amended and revised, an investigation of the Objections was conducted under my direction and supervision. During the investigation, each party was afforded full opportunity to present witnesses, evidence, documents, statements, and letters pertinent to the issues raised by the Objections. On the basis of all the evidence and materials adduced in the investigation, I report as follows:

OBJECTION 1:

The Decision and Direction of Election issued on August 29, 1968 directed the Employer to file with me an election eligibility list containing the names and addresses of *all* the eligible voters on or before September 5, 1968. (Emphasis supplied.) This was consistent with *Excelsior Underwear, Inc.*, 156 NLRB 1236.

It is undisputed that the Employer declined to furnish the entire list of names and addresses. On September 5, 1968 the Employer furnished the names and addresses of only 83 employees out of a total number of approximately 400 eligible employees.[1] According to the Employer, the furnished names and addresses were only those of employees who gave written permission to the Employer to

1. An unfair labor practice charge filed by the Petitioner, which was subsequently withdrawn, delayed prompt conduct of the election. The total number of eligible voters was 339 on the day of the election.

submit this information. The remaining employees did not authorize the Employer to furnish their names and addresses to the Union.

The Employer contends that it should be required to furnish the names and addresses only for those employees who authorized the release of such information to the Union.

The Board's *Excelsior* rule requires the Employer to submit the names and addresses of all the employees without any qualification. It does not permit the exclusion of names and addresses because their release was not authorized by the individual eligible voters involved. *Excelsior Underwear Inc.*, *supra*; *British Auto Parts, Inc.*, 160 NLRB 239; *British Auto Parts, Inc. v. NLRB*, — F. 2d — (CA-9, 1968); *Montgomery Ward & Co., Inc.*, 160 NLRB 1188.

Although the Board does not mechanically apply *Excelsior*, the Employer's failure to submit the complete list, unless authorized by each eligible voter, constitutes an unwillingness to afford the Union full access to all eligible employees. Such conduct constitutes failure to comply with *Excelsior*. *Cf. Telonic Instruments, A Division of Telonic Industries, Inc.*, 173 NLRB No. 87.

In view of the above and consistent with the precedents, I find and conclude that *Objection 1* raises material and substantial issues with respect to the election. Accordingly, I shall sustain the Objection.

OBJECTIONS 2-9:

Inasmuch as I shall sustain *Objection 1* and direct the holding of a new election, I find it unnecessary to consider the remaining Objections.

FINDINGS, CONCLUSIONS AND DIRECTION OF SECOND ELECTION.

Consistent with the results of the investigation and NLRB and Court decisions I find, conclude and determine

that since *Objection 1* raises material and substantial issues with respect to the election, I sustain it. Accordingly, the election conducted on December 12, 1968 is set aside. I find it unnecessary, therefore to dispose of the remaining Objections. Further, I find and conclude that the election herein was *invalid* within the meaning of Section 9(c)(3) of the Act.

Pursuant to Section 102.69(c), NLRB Rules and Regulations, Series 8, as amended, I direct a second election. The period for eligibility will be the payroll period immediately preceding the date of the issuance of the second Notice of Election.[2]

Dated at Philadelphia, Pennsylvania this 16th day of January, 1969.

BERNARD SAMOFF,

Bernard Samoff, *Regional Director for the Fourth Region of the National Labor Relations Board.*

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2. Election eligibility lists, containing the names and addresses of all the eligible voters, must be filed with the Regional Director within 7 days of the date of this Direction of Second Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, 1700 Bankers Securities Building, Juniper and Walnut Streets, Philadelphia, Pennsylvania 19107 on or before January 23, 1969. Under Board directives, no extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear Inc.*, 156 NLRB 1236.

ORDER.

(Feb. 10 3:52 P. M. '69.)

204404 [13013 MSCEV157305

RAAULJHZ RUEVDEL0004 0412010-UUUU—RUEVDDG
FM ROBERT VOLGER ASSOC EXEC SECY WASH DC
NLRB

TO RUEVDDG/2/NLRB 4TH REG. ATT: BERNARD L.
SAMOFF PHILADELPHIA, PA.

BT

RE: DELAWARE VALLEY ARMAMENTS, INC., 4-RC-7908. IT IS HEREBY ORDERED THAT THE EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION ON OBJECTIONS TO ELECTION AND DIRECTION OF SECOND ELECTION BE, AND IT HEREBY IS, DENIED AS IT RAISES NO SUBSTANTIAL ISSUES WARRANTING REVIEW. BY DIRECTION OF THE BOARD.

BT

SUBPOENA DUCES TECUM.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Delaware Valley Armaments, Inc.
Church Road, Mt. Laurel, New Jersey

Request therefor having been duly made by Bernard Samoff, Regional Director Region 4, National Labor Relations Board,

whose address is 1700 Bankers Securities Building, Juniper and Walnut Streets, Philadelphia, Pennsylvania

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE Bernard Samoff, Regional Director, or his designated agent *of the National Labor Relations Board, at* 1700 Bankers Securities Building, Juniper and Walnut Streets, *in the City of* Philadelphia, Pennsylvania *on the* 29th *day of* May, 1969, *at* 10 *o'clock a.m. EDST of that day, to testify in the Matter of* Delaware Valley Armaments, Inc. Case No. 4-RC-7908

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

(See attached sheet)

B- 71501 (Seal)

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand and authorized the issuance hereof.

Issued at Philadelphia, Pennsylvania
this 20th *day of* May, 1969

(Name Illegible)

Attachment—Subpoena Duces Tecum B-71561

Personnel and/or payroll records of Delaware Valley Armaments, Inc., showing the name and address of each employee of said Delaware Valley Armaments, Inc. who was employed at its Cherry Hill, New Jersey and Mt. Laurel, New Jersey plants during the payroll period immediately preceding January 16, 1969, in an appropriate unit described as, "All production and maintenance employees, but excluding all temporary office clerical, professional, and technical employees, guards, and supervisors as defined by the Act"; or, in lieu thereof, provided notice is received not later than 4:00 P.M., E.D.S.T., May 27, 1969, the Employer may make the above-said records available at its offices at Church Road, Mt. Laurel, New Jersey, and at Cherry Hill, New Jersey, to an agent or agents of the National Labor Relations Board for his or their inspection and use in making therefrom a list of the names and addresses of all employees eligible to vote in the above-described unit; or, alternatively, and in lieu of the above physical production of said personnel and/or payroll records, the Employer may file a list containing the names and addresses of all eligible voters in the aforesaid unit with the said Regional Director, or his designated agent, on or before May 27, 1969.

[61129 EVDDG

ORDER.

(June 9 7:18 A.M. '69)

205457 [13013 MSCEV267573

RAAUIJAZ RUEVDEL0016 1572140-UUUU—
RUEVDDG.

FM ROBERT VOLGER ASSOC EXEC SECY WASH DC NLRB

TO RUEVDDG/2/NLRB 4TH REG ATT BERNARD SAMOFF PHILADELPHIA, PA.

RE: Delaware Valley Armaments, Inc., 4-RC-7908. Employer and employees' petitions to revoke subpoena duces tecum are hereby denied as evidence was not shown of special circumstances why excelsior list need not be furnished at the time of the representation case hearing and direction of election or in response to regional director's supplemental decision on objections to election and direction of second election of January 16, 1969, or in petitions to revoke. By direction of the board:

BT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 838-69.

NATIONAL LABOR RELATIONS BOARD,
Applicant,

v.

DELAWARE VALLEY ARMAMENTS, INC.,
Respondent.

ORDER TO SHOW CAUSE.

The National Labor Relations Board having filed an application requesting that an order issue directing respondent Delaware Valley Armaments, Inc. to comply with a subpena *duces tecum* duly and properly served upon it in Board Case No. 4-RC-7908, as set forth in the application, and good cause appearing therefor;

IT IS HEREBY ORDERED that respondent appear before this Court at the United States Courthouse in Camden, New Jersey, on the 4th day of August, 1969, at 10:00 a.m., or as soon thereafter as counsel can be heard, and then and there show cause, if any there be, why an order should not issue directing respondent to comply with the subpena in Board Case No. 4-RC-7908, pursuant to Section 9 of the National Labor Relations Act, as amended (29 U. S. C., Sec. 151, *et seq.*).

IT IS FURTHER ORDERED, pursuant to the authority conferred upon this Court by Rule 81(a)(3), Federal Rules of Civil Procedure, that service upon respondent of a copy of the order to show cause and of the application upon which it is based be made on or before the 25th day of July, 1969, by service thereof upon any officer or agent of respondent, and that respondent shall file and serve its answer to the application no later than August 1, 1969. Service of a copy of this order and the application, in any manner provided by Rule 5(b) of the Federal Rules of Civil Procedure, shall be deemed good and sufficient service.

Dated at Newark, N. J.
this 18th day of July, 1969

/s/ ROBERT SHAW,
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 838-69.

ORDER ALLOWING INTERVENTION.

NATIONAL LABOR RELATIONS BOARD,
Applicant,

v.

DELAWARE VALLEY ARMAMENTS, INC.,
Respondent;

and

EDITH BISHOP, EMILIA COMOROTE, ELVA LOVE, DOROTHY PARKS, HELEN REYNOLDS, DONNA RIEBLE, JUANITA RUDOLPH, JENNY TREMPER, ANNA WEBBER AND CAROLYN WERTS,

APPLICANTS FOR INTERVENTION INDIVIDUALLY AND AS REPRESENTATIVES OF A CLASS.

Application for Intervention having been filed by Epstein, Fluharty, Freeman & Gerstein, E. Stevenson Fluharty appearing on behalf of individual applicants and as representatives of a class which persons are hereinafter named, and the same having come on for hearing and no one objecting thereto: IT is on this 10 day of September, 1969.

ORDERED that the application of Edith Bishop, Emilia Comorota, Elva Love, Dorothy Parks, Helen Reynolds,

Donna Riebel, Juanita Rudolph, Jennie Tremper, Anna Weber, and Carolyn Werts to intervene individually and as representatives of a class, be and the same is hereby granted.

/s/ MITCHELL H. COHEN,
Mitchell H. Cohen, Judge,
U. S. District Court,

United States District Court

FOR THE DISTRICT OF NEW JERSEY.

CIVIL ACTION NO. 838-69.

NATIONAL LABOR RELATIONS BOARD,

Applicant,

v.

DELAWARE VALLEY ARMAMENTS, INC.,

Respondent.

ORDER REQUIRING OBEDIENCE TO SUBPENA DUCES TECUM.

This cause came to be heard upon application of the National Labor Relations Board, hereafter referred to as the Board, for an order requiring obedience to subpena duces tecum issued by the Board and duly served on respondent pursuant to Section 11(1) of the National Labor Relations Act, as amended (hereinafter referred to as the Act) and upon the issuance of an order to show cause why said order should not be granted as prayed in said application. The Court, upon consideration of the pleadings, briefs, memoranda, argument of counsel and the entire record in the case, concludes and finds that respondent's failure and refusal to appear and otherwise produce the records and documents called for in said subpena, constitutes a refusal to obey a subpena within the meaning of Section 11(2) of the Act.

Now, therefore, upon the entire record, it is

ORDERED, ADJUDGED AND DECREED that within seven (7) days after a second notice of election to be issued by the Regional Director for the Fourth Region, respondent shall produce and otherwise make available to the Board's Regional Office respondent's personnel and payroll records showing the names and latest addresses known to respondent of all employees, in the unit set forth in Board subpena B-71501, and who were employed during the payroll period immediately preceding the date of said notice; or, in lieu thereof, provided notice is received within five (5) days of the said notice of election the Employer may make the above-said records available at its offices at Church Road, Mount Laurel, New Jersey, and at Cherry Hill, New Jersey, to an agent or agents of the National Labor Relations Board for his or their inspection and use in making therefrom a list of the names and addresses of all employees eligible to vote in the above-described unit; or, alternatively, and, in lieu of the above physical production of said personnel and or payroll records, the Employer may file a list containing the names and addresses of all eligible voters in the aforesaid unit with the said Regional Director, or his designated agent, within seven (7) days of the said Notice of Election.

Done at Camden, New Jersey, this 30th day of October, 1969.

/s/ MITCHELL H. COHEN,
United States District Judge.

United States District Court

DISTRICT OF NEW JERSEY.

CIVIL NO. 838-69.

MEMORANDUM.

(Filed October 23rd, 1969.)

NATIONAL LABOR RELATIONS BOARD,
Applicant,

v.

DELAWARE VALLEY ARMAMENTS, INC.,
Respondent,

AND

EDITH BISHOP; EMILIA COMOROTE, ELVA LOVE, DOROTHY PARKS, HELEN REYNOLDS, DONNA RIEBLE, JUANITA RUDOLPH, JENNY TREMPER ANNA WEBBER AND CAROLYN WERTS,
INTERVENORS INDIVIDUALLY AND REPRESENTATIVES OF A CLASS.

Appearances:

ALFRED VITARELLI, ESQUIRE,
Philadelphia, Pa.,
Attorney for the Applicant.

WALLACE, DOUGLAS, GERRY & MARIANO, ESQUIRES,
By JOHN F. GERRY, ESQUIRE,
Camden, New Jersey, and
DUANE, MORRIS AND HECKSCHER, ESQUIRES,
By ROLAND MORRIS, ESQUIRE,
Philadelphia, Pa.,
Attorneys for the Respondent.

EPSTEIN, FLUHARTY, FREEMAN & GERSTEIN, ESQUIRES,
By E. STEVENSON FLUHARTY, ESQUIRE,
Camden, New Jersey,
Attorneys for the Intervening Employees.

COHEN, *District Judge:*

This is an application by the National Labor Relations Board for an order directing the respondent, Delaware Valley Armaments, Inc., to make available to the Board's Regional Office in Philadelphia, Pennsylvania, a list of the names and addresses of its employees eligible to vote in an election to be conducted by the Board under *section* 9 of the *National Labor Relations Act* 29 *U. S. C.* § 151, *et seq.*

By order of the Court, intervention individually and as representatives of a class was granted to the above named employees of the respondent.

Upon the continued return day, September 8th, 1969, of the Order to Show Cause heretofore entered, agreement was reached among all counsel, with the approval of the Court, for the submission of the issue upon briefs, stipulation, pleadings, and without oral argument.

The Court has reviewed the aforementioned from which it appears that, as a result of the filing of a petition by the International Union of Electrical, Radio & Machine Workers, AFL-CIO with the Board seeking to represent the respondent's employees, the Regional Director, on August 29th, 1968, ordered an election to be conducted by secret ballot among the production and maintenance employees of the respondent at its plants in Cherry Hill and Mount Laurel, New Jersey. Incidental thereto, the Regional Director further ordered the respondent to submit an election eligibility list containing the names and addresses of all its employees eligible to vote in said election. The respondent failed to do so. On December 12th, 1968,

an election was conducted and the Union lost. Objection by the Union, which was sustained, to the election was lodged with the Regional Director based upon the respondent's refusal to furnish the aforesaid list. The election was set aside and a second one ordered incident to which the respondent was specifically ordered to submit an election eligibility list. Exception to this was taken by the respondent which was denied by the Board. The respondent refused again to submit the list and the second election has been held in abeyance. On May 20th, 1969, the Regional Director issued a *subpoena duces tecum*, pursuant to 29 *U. S. C.* Sec. 161(1), which has not been complied with by the respondent. Application was thereafter made to this Court seeking an order requiring the respondent to obey the *subpoena duces tecum*.

Objection to the request of the Board is made by the respondent on the grounds that compliance therewith would result in harassment of its employees; that the Union organizers have criminal records; that its employee force is primarily female, the majority of which do not desire to have their addresses disclosed; and that no adjudicatory hearing was conducted by the Board. The intervening employees adopt this position.

The order of the Board directing the respondent to produce an election eligibility list was predicated upon the so-called "*Excelsior Rule*" which found its genesis in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966). The policy therein expressed was to require such a list in all Board-conducted elections in order to promote the communication of election issues to the employees and, further, to aid in determining the voting eligibility of employees. In the Supreme Court's recent decision in *N. L. R. B. v. Wyman-Gordon Co.*, — U. S. —, 89 S. Ct. 1426 (1969), the *Excelsior* requirement was held to be substantively valid. The Court stating at page 1430:

> "We have held in a number of cases that Congress granted the Board a wide discretion to ensure the fair and free choice of bargaining representatives. * * * The disclosure requirement furthers this objective by encouraging an informed electorate and by allowing Unions the right of access to employees that management already possesses. It is for the Board and not for this Court to weigh against this interest the asserted interest of employees in avoiding the problems that Union solicitation may present."

It was further held by the Court that the disclosure requirement in *Excelsior* could be enforced by the Board's subpoena power.

As to the respondent's contentions that the employees' rights of privacy would be invaded by the grant of the relief requested and possibility of their harassment, see the recent expression of the Third Circuit Court of Appeals in *N. L. R. B. v. Q-T Shoe Manufacturing Co.*, — F. 2d — (3 Cir. 1969) wherein the following is contained:

> "The mere possibility of such harassment is surely not a sufficient ground for invalidating a rule designed to achieve greater enlightenment with respect to labor election issues, and it is noteworthy that every Court which has passed on the issue has held the Excelsior rule to be a legitimate exercise of the Board's jurisdiction over representation proceedings."

The objection that some of the Union organizers have criminal records is without merit. See an analogous case where violence actually occurred, *NLRB v. Duncan Foundry & Machine Works*, 67 LRRM 2516 (1968). The public policy inherent in *Excelsior* is paramount and requires submission of the election eligibility list. Equally without merit is the

allegation that the Board did not weight or adjudicate the issue by hearing, which it did on two distinct occasions.

For the foregoing reasons the relief requested by the applicant Board shall be granted and an order shall issue enforcing the Board's subpoena.

Counsel for the applicant may submit an appropriate order.

MITCHELL H. COHEN,
Mitchell H. Cohen,
Judge, United States District Court.

United States District Court

FOR THE DISTRICT OF NEW JERSEY

CIVIL No. 838-69

NATIONAL LABOR RELATIONS BOARD,
Applicant,

v.

DELAWARE VALLEY ARMAMENTS, INC.,
Respondent.

ORDER GRANTING STAY.

(Filed Nov. 13, 1969.)

THIS MATTER having been brought to the attention of the Court by Duane, Morris & Heckscher, Esquires, and Wallace, Douglas, Gerry & Mariano, Esquires, Roland Morris, Esquire, and John B. Mariano, Esquire, respectfully, attorneys appearing for the respondent, and in the presence of Alfred Vitarelli, Esquire, attorney for the applicant; and

The Court having read and examined the Petition of the respondent and the Court being of the opinion that sufficient good cause has been shown to maintain the status quo pending a decision in respondent's appeal to the United States Court of Appeals for the Third Circuit;

That it is on the 13th day of November, 1969 ORDERED and ADJUDGED that respondent's petition for an order to stay the order of this Court dated October 30, 1969 until the decision of the United States Circuit Court of Appeals for the Third Circuit is rendered on respondent's appeal be and the same is hereby granted.

/s/ MITCHELL H. COHEN.
Mitchell H. Cohen.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 18390

C. A. MISC. RECORD NO. 1411

NATIONAL LABOR RELATIONS BOARD

v.

DELAWARE VALLEY ARMAMENTS, INC., AND (INTERVENORS) EDITH BISHOP, EMILIA COMOROTE, ELVA LOVE, DOROTHY PARKS, HELEN REYNOLDS, DONNA RIEBLE, JUANITA RUDOLPH, JENNY TREMPER, ANNA WEBBER AND CAROLYN WERTS, INDIVIDUALLY AND AS REPRESENTATIVES OF A CLASS,

DELAWARE VALLEY ARMAMENTS, INC.,

Appellant

(D. C. CIVIL NO. 838-69)

ORDER OF DECEMBER 5, 1969.

Present: GANEY, SEITZ and ALDISERT, *Circuit Judges*.

Upon consideration of applicant-appellee's emergency motion to vacate stay pending decision on appeal and to grant summary affirmance of the District Court's order enforcing subpoena duces tecum, and the answer in opposition thereto, and after hearing, all in the above-entitled case.

It is ORDERED that applicant-appellee's motion to vacate stay pending appeal and for summary affirmance of the order of the District Court enforcing subpoena duces tecum be and hereby is denied; and

It is FURTHER ORDERED that the appeal in this case be docketed and the record filed not later than December 10, 1969 and that the following briefing schedule be followed:

(1) Appellant to file brief and appendix not later than December 31, 1969;

(2) Appellee to file brief not later than January 21, 1970;

(3) Appellant to file reply brief, if any, not later than January 31, 1970; and

It is Further ORDERED that the Clerk of this Court list this case for argument on the merits before a panel of this Court during the week of February 16, 1970.

By the Court,

J. CULLEN GANEY,
Senior Circuit Judge.

Dated: December 5, 1969

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 18390.

NATIONAL LABOR RELATIONS BOARD

v.

DELAWARE VALLEY ARMAMENTS, INC., AND (INTERVENORS) EDITH BISHOP, EMILIA COMOROTE, ELVA LOVE, DOROTHY PARKS, HELEN REYNOLDS, DONNA RIEBLE, JUANITA RUDOLPH, JENNY TREMPER, ANNA WEBBER AND CAROLYN WERTS, INDIVIDUALLY AND AS REPRESENTATIVES OF A CLASS

DELAWARE VALLEY ARMAMENTS, INC., *Appellant*

(D. C. CIVIL ACTION No. 838-69.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Present: KALODNER, and VAN DUSEN, *Circuit Judges* and FULLAM, *District Judge*.

JUDGMENT.

(Filed August 11, 1970.)

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed October 30, 1969, be, and the same is hereby affirmed, with costs taxed in favor of appellee.

ATTEST:

THOMAS E. QUINN,
Clerk.

August 11, 1970.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18390

NATIONAL LABOR RELATIONS BOARD

v.

DELAWARE VALLEY ARMAMENTS, INC., AND (INTERVENORS) EDITH BISHOP, EMILIA COMOROTE, ELVA LOVE, DOROTHY PARKS, HELEN REYNOLDS, DONNA RIEBLE, JUANITA RUDOLPH, JENNY TREMPER, ANNA WEBBER AND CAROLYN WERTS, INDIVIDUALLY AND AS REPRESENTATIVES OF A CLASS

DELAWARE VALLEY ARMAMENTS, INC., *Appellant*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued February 17, 1970.

Before KALODNER and VAN DUSEN, *Circuit Judges* and FULLAM, *District Judge*.

OPINION OF THE COURT

(Filed August 11, 1970.)

KALODNER, *Circuit Judge.*

The District Court entered an Order[1] enforcing a subpoena[2] of the National Labor Relations Board ("Board"), directing the appellant Delaware Valley Armaments, Inc. ("DVA") to furnish a list of the names and addresses of its employees eligible to vote in a representation election ordered by the Board, and this appeal followed.

The background facts are as follows:

On August 9, 1968, the International Union of Electrical, Radio & Machine Workers, AFL-CIO ("Union") filed a petition with the Board's Regional Office in Philadelphia, Pa., seeking a representation election with respect to DVA's approximately 300 production and maintenance employees.

At the pre-election hearing on the petition, on August 26, 1968, DVA stipulated the Board's jurisdiction and its denial of Union's request to represent its production and maintenance workers. It, however, informed the hearing officer that it would not file a list of the names and addresses of all its employees because in its opinion the Board lacked authority to direct such filing. In doing so it specifically challenged the validity of the election eligibility list "requirement" rule laid down in Excelsior Underwear, Inc., 156 N. L. R. B. 1236 (1966),[3] commonly referred to as the *Excelsior* Rule.

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1. The Order was issued upon the Board's application to the District Court for enforcement of its subpoena *duces tecum* directed to DVA, pursuant to Section 11(2) of the National Labor Relations Act, 29 U. S. C. A. § 161(2).

2. The Board had issued its subpoena pursuant to the provisions of Section 11(1) of the Act, 29 U. S. C. A. § 161(1).

3. In *Excelsior* the Board said (pp. 1239-1240):

> ". . . we now establish a requirement that will be applied in all election cases. That is, within 7 days after the Regional Director has approved a consent-election agreement entered into by the parties . . . or after the Regional Director or the Board has directed an election . . ., the employer must file with the

On August 29, 1968, the Board's Regional Director issued a Decision and Direction of Election. The latter directed DVA to file an election eligibility list containing the names and addresses of all eligible voters within seven days, and further stated that failure to comply with this directive would be grounds for setting aside the election, upon proper objection.

On September 5, 1968, DVA filed a list containing names and addresses of only 83 of its employees eligible to vote. In its letter enclosing the list DVA said:

> "For your information, DVA employs mostly women and a great number of these women complained that the union had made threats and harassed them, and DVA was asked by these women not to supply their addresses. Because of this situation, DVA requested of all employees that they specify whether or not they wished their addresses released. As you can see, a vast majority of the employees refused to have their addresses released."

The letter did not state details of the alleged harassments and threats or identify victims or perpetrators.

On September 12, 1968, DVA furnished the Board with an additional list containing the names, but not the addresses, of all eligible DVA employees. The Board took no further action, and at the representation election conducted on December 12, 1968, the Union was defeated by a vote of 220 to 93. Union then filed objections asserting, *inter alia*, DVA's failure to file the directed list of its employees.

Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed." (footnote omitted).

On January 16, 1969, the Regional Director, after an *ex parte* investigation, issued a Supplemental Decision on Objections to Election and Direction of Second Election, assigning as a basis DVA's failure to comply with its directive as to filing a complete list of names and addresses of eligible employees. In the stated Supplemental Decision, DVA was again directed to file the mooted eligibility list within seven days of the ordered second election.

On January 22, 1969, DVA filed "Exceptions and Request for Review to the Second Supplemental Decision." It therein repeated its prior allegations of union threats and harassment, and charged for the first time that "a number of the Union organizers assigned to the labor campaign had known criminal records." Again, there was no specification as to the identity of harassed or threatened employees nor specification as to the identity of the concerned Union organizers or the details of their "known criminal records." The Exceptions renewed earlier challenges to the validity of the Board's Order to file the mooted eligibility list. They also requested "oral argument" with respect to the contentions made therein, but made no request for a hearing, although they stated that DVA "wishes to indicate its willingness to participate in a hearing in which the facts above, as well as additional facts, would be placed in the record."

On February 10, 1969, the Board denied the Request for Review for the assigned reason that "it raises no substantial issues warranting review."

On May 6, 1969, DVA wrote to the Board stating that in view of the Supreme Court's decision on April 23, 1969, in National Labor Relations Board v. Wyman-Gordon Co., 394 U. S. 759, "it is submitted that the only appropriate way to proceed in the instant matter, is to hold a hearing so that the propriety of such a list [of employees] in the

instant case may be 'weighed' in accordance with the demands of the Supreme Court."

The Board did not grant the suggested hearing, and on May 20, 1969, issued the challenged subpoena *duces tecum* directing DVA to produce its personnel and payroll records showing the names and addresses of all eligible employees, or, in lieu thereof, to file a list containing this information.

On May 29, 1969, DVA filed a "Petition to Revoke" the subpoena which alleged, *inter alia*, that the majority of its more than 300 employees were female and most of them had requested DVA not to submit their names and addresses because "the organizing personnel of the Union" included men "with known criminal records," and "union personnel . . . have harassed, threatened, restrained, coerced and otherwise unlawfully interfered with the employees. . . ." The Petition further alleged that the Board had initially denied DVA's request for a hearing on the issue as to whether DVA should be required to submit a list of its employees.

On June 9, 1969, the Board, by telegraphic order, denied the "Petition to Revoke" and its request for a hearing, on the ground that "evidence was not shown of special circumstances why the Excelsior list need not be furnished at the time of the representation case hearing and direction of election or in response to the Regional Director's Supplemental Decision and on objection to election and direction of second election on January 16, 1969, or in petitions to revoke."

On July 18, 1969, the Board applied to the District Court for an order requiring obedience to its subpoena *duces tecum*.

DVA filed in the District Court proceedings a "Memorandum of Controlling Facts" in which it named three

union representatives with alleged "known criminal records." The "Memorandum" cited records of the County Clerk's Office in Camden County, New Jersey, which revealed that one of the three had been found guilty of bookmaking and fined $1,000.00, and newspaper clippings showing that another had been arrested and charged with inciting to riot in picketing a strike-bound plant some 12 years earlier in 1957, and that the third had invoked the Fifth Amendment in 1957 and 1967 when he was asked by Senate committees whether he was an active Communist in 1950 and 1956. The Memorandum did not submit follow-up data as to the outcome of the incidents involving the second and third union representatives.

It may be noted parenthetically that in the affidavits accompanying the "Application for Intervention," filed by ten DVA female employees in the District Court, none of the three union organizers were charged with threats or harassment. The burden of these affidavits was that the employees were concerned that "their right of privacy" would be violated in that they might be exposed to home phone calls or visits of union organizers.

The District Court, in a "Memorandum" accompanying its Order enforcing the Board's subpoena, held that the Board properly acted within its powers in directing filing of the list of names and addresses of DVA employees eligible to vote in the ordered representation election. It also found that: "The objection that some of the Union organizers have criminal records is without merit."

On this appeal from the District Court's Order, DVA contends that it was denied "procedural due process" when it was not afforded an "adjudicatory hearing" prior to the Board's entry of its Order directing it to file a list of the names and addresses of all its employees, and again when

* The Memorandum is unreported.

the Board, without a hearing, denied its "Petition to Revoke" its subpoena *duces tecum* for production of the list of employees.

DVA urges that its contentions are supported by the "doctrine" of *Wyman-Gordon, supra*.

The Board, in turn, says that *Wyman-Gordon* establishes the validity of the Board's list requirement order in the instant case.

We agree with the Board's stated contention.

Wyman-Gordon[4] decided that a direction to an employer to submit a list of the names and addresses of its employees, when incorporated in a Board order to hold a representation election "is unquestionably valid" since it was entered "*in an adjudicatory proceeding*"; that the Board has "a wide discretion to insure the fair and free choice of bargaining representatives"; "[t]he disclosure requirement furthers this objective by encouraging an informed employee electorate and by allowing the right of access to employees that management already possesses"; and "[i]t *is for the Board and not for this Court to*

4. In *Wyman-Gordon*, the Board, as here, ordered a representation election to be held, and in doing so further ordered the employer to furnish a list of the names and addresses of employees eligible to vote at the election. The employer refused to comply with the order to furnish the list, contending it was invalid; the unions there concerned lost the election and the Board sustained their objections to the election because the employer had not furnished the list. The employer again refused to obey a Board order to furnish the list or produce its personnel and payroll records showing its employees' names and addresses, and the Board then issued a subpoena *duces tecum* for the list or records, and thereafter filed an action in the District Court seeking the subpoena's enforcement.

The District Court held the Board's order valid and entered an order enforcing the subpoena. 270 F. Supp. 280 (D. C. Mass. 1967). The United States Court of Appeals for the First Circuit reversed, 397 F. 2d 394 (1968), on its holding that the Board's order to furnish the list was invalid because it was premised on the so-called *Excelsior* Rule, and the latter had not been promulgated in accordance with the rule-making requirements of the Administrative Procedure Act, 5 U. S. C. A. § 553.

weigh against this interest the asserted interest of employees in avoiding the problems that union solicitation may present." 394 U. S. 766-767 (emphasis supplied).

Wyman-Gordon further held that Section 11(1) of the National Labor Relations Act "empowers the Board to issue subpoenas 'requiring . . . production of any evidence'" in connection with any investigation or proceeding incident to the exercise of powers vested in it by the Act, and that in the context of Section 11(1) "evidence" means not only proof at a hearing but also books and records and other papers which will assist the Board in making a particular investigation." *Wyman-Gordon* additionally held that Section 11(2) gives the district courts jurisdiction, upon application by the Board, to issue an order requiring a person who has refused to obey the Board's subpoena "to appear before the Board . . . there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question . . . ." 29 U. S. C. § 161 (1), (2)." 394 U. S. 768.

It should be noted that the cited holdings in *Wyman-Gordon* are from the opinion of Mr. Justice Fortas, in which Chief Justice Warren and Justices Stewart and White joined, and that Mr. Justice Black in his opinion "concurring in the result," in which Justices Brennan and Marshall joined, stated his agreement with respect to them.[5]

5. In so holding, the Court at 394 U. S. 769, cited *inter alia*, our ruling to the same effect, in National Labor Relations Board v. O. F. Shoe Manufacturing Co., Inc., 409 F. 2d 1247, 1253, decided April 11, 1969, 12 days prior to *Wyman-Gordon*.

6. In his plurality opinion, Mr. Justice Fortas held that the *Excelsior* rule, announced prospectively, in Excelsior Underwear Inc., 156 NLRB 1236 (1966), was invalid as a "rule" because the Board in promulgating it, had not complied with the rule-making requirements of the Administrative Procedure Act, 5 U. S. C. A. § 553. The *requirements* of the *Excelsior* rule as to the furnishing of a list of employees in a representation election ordered by the Board, quoted here in Note 3, were, however, approved *per se*, and held to be enforceable when their compliance was directed in a Board order to hold a representation election.

The critical essence of *Wyman-Gordon* is that a representation election proceeding is an "adjudicatory proceeding"; a direction to an employer to furnish a list of its employees when incorporated in a Board order to hold a representation election is "unquestionably valid," since the Board has "a wide discretion" in acting to insure a "fair and free choice of bargaining representatives"; and that with respect to the exercise of its discretion "it is for the Board," and not for a court, to weigh the Board's interest in assuring a fair election against "the asserted interest of employees in avoiding the problems that union solicitation may present."

In our opinion, *Wyman-Gordon* is dispositive of DVA's contention that it was not afforded an "adjudicatory hearing" with resultant denial of "procedural due process."

Other circuits, in post *Wyman-Gordon* cases, are in accord. See, e.g., National Labor Relations Board v. Cone

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Wyman-Gordon said:

"In the present case . . . the respondent itself was specifically directed by the board to submit a list of the names and addresses of its employees for use by the unions in connection with the election. This direction, which was part of the order directing that an election be held, is *unquestionably valid*. See e.g. NLRB v. Waterman S. S. Co., 309 U. S. 206, 226 (1940). Even though the direction to furnish the list was followed by citation to 'Excelsior Underwear, Inc.,' 156 NLRB No. 111,' it is an order in the present case that the respondent was required to obey. Absent this direction by the Board, the respondent was under no compulsion to furnish the list because no statute and no validly adopted rule required it to do so.

"Because the Board in an *adjudicatory proceeding* directed the respondent itself to furnish the list; the decision of the Court of Appeals for the First Circuit must be reversed." 394 U. S. 760 (emphasis supplied, footnotes omitted).

In the above-cited *Waterman*, it was said with respect to an ordered representation election:

"The control of the election proceeding, and *the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone.* Interference in those matters constituted error on the part of the court below." 309 U. S. 226 (emphasis supplied, footnote omitted).

Mills Corporation, 419 F. 2d 394 (4 Cir. 1969), cert. den., — U. S. — (1970); National Labor Relations Board v. Daniel Construction Company, Inc., 418 F. 2d 790, 791 (4 Cir. 1969), cert. den., — U. S. — (1970); Chickasha Mobile Home, Inc., 410 F. 2d 758 (8 Cir. 1969).

In the instant case, DVA concedes that the Board proceedings which followed filing of Union's petition seeking a representation election, were "adjudicatory proceedings", as was held in *Wyman-Gordon*. It complains only that in the course of the adjudicatory proceedings it was "entitled to a hearing prior to the promulgation" of the Board's order to file the employee disclosure list, in accordance with its constitutional due process rights. It makes this contention despite the fact that here, as in *Wyman-Gordon*, the Board, at the very outset of the representation proceedings, held a hearing on Union's petition, in accordance with the requirements of Section 9(c)(1)[8] of the National Labor Relations Act, and the Board's Regulations.[9] This hearing is the only hearing mandated by the Act in the course and determination of the pre-election adjudication. Further, the Act does not mandate a hearing on objections to an election already held. The Board's Regulations provide that its regional directors may, in their discretion, hold a hearing in such instance or make final disposition on the basis of an administrative investigation.[10]

Section 551(7)[11] of the Administrative Procedure Act defines "adjudication" as "agency process for the formulation of an order," and Section 554(a)(6)[12] excepts "the certification of worker representatives" from its require-

8. 29 U. S. C. A. § 159(c)(1).
9. 29 C. F. R. §§ 102.63(a), 102.64.
10. 29 C. F. R. § 102.69(c).
11. 5 U. S. C. A. § 551(7).
12. 5 U. S. C. A. § 554(a)(6).

ment that in "Adjudications" federal agencies must grant a hearing on disputed factual issues.

On the score of DVA's due process contention it has been specifically ruled that constitutional due process is not violated where a hearing is not made mandatory in a federal agency adjudication. Law Motor Freight, Inc. v. Civil Aeronautics Board, 364 F. 2d 139, 143-144 (1 Cir. 1966), cert. den., 387 U. S. 905 (1967).

This, too, must be said with respect to DVA's complaint that it was not afforded a hearing on the Board's disclosure order.

DVA does not dispute that the Board in the course of the election representation proceedings "reviewed" its "submissions" with respect to its objections to issuance of the disclosure requirement founded on its employees' fears of union harassment at their homes should their addresses be made available to union organizers. Further, DVA does not dispute that in the course of its "review" the Board "made an investigation" of the "submissions."[13]

It may be observed as to the allegations of employee fears of union harassment, that it is settled, as earlier noted: "It is for the Board and not for this Court to weigh against this interest [for a fair representation election] the asserted interest of employees in avoiding the problems that union solicitation may present,"[14] and "[t]he mere possibility of such harassment [offensive union solicitation] is surely not a sufficient ground for invalidating" a Board directive to an employer to submit a list of employees' names and addresses

13. At page 13 of its "Brief for Appellant" DVA said:

"Respondent does not dispute the fact *that the Board reviewed both of Respondent's submissions* (the Exceptions and Petition to Revoke). The Board also indicated in Exhibit C to its application for a Subpoena in this case that it made an investigation. . . . This assertion is likewise accepted by the employer." (emphasis supplied).

14. *Wyman-Gordan* at 394 U. S. 767.

in connection with an ordered representation election.[15] With respect to fears of employees that "they will be subject to harassment at their homes in violation of their constitutional right to privacy", it has been expressly held that ". . . the mere possibility that employees will be inconvenienced by telephone calls or visits to their homes is far outweighed by the public interest in an informed electorate."[16]

Here, the Board, after investigation into, and review of, DVA's general and non-specific allegations of employee fears of union harassment, found that "evidence was not shown of special circumstances" why the employees' list "need not be furnished at the time of the representation case hearing." Thus, as the Board asserts, "the Company's contentions were heard, considered, and adjudicated." The District Court, too, found that the Board had properly weighed and adjudicated DVA's stated contentions.

There remains this to be said:

Remedies are available to DVA and its co-appellants if union harassment or coercion prevents a free representation election, via a petition to the Board to set aside the election for that reason if the union wins the election. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); National Labor Relations Board v. J. P. Stevens & Co., 409 F. 2d 1207, 1209 (4 Cir. 1969).

Moreover, further remedies are available to appellants via the enforcement[17] and review[18] provisions of the Act in

15. National Labor Relations Board v. Q-T Shoe Manufacturing Co., Inc., 409 F. 2d 1247, 1250 (3 Cir. 1969).

16. National Labor Relations Board v. J. P. Stevens & Co., Inc. 409 F. 2d 1207, 1209 (4 Cir. 1969). Accord: British Auto Parts, Inc. v. National Labor Relations Board, 405 F. 2d 1182, 1193 (9 Cir. 1968), cert. den., 394 U. S. 1012 (1969); National Labor Relations Board v. Hanes Hosiery Division-Hanes Corporation, 394 F. 2d 188, 191 (4 Cir. 1967), cert. den., 390 U. S. 950 (1968).

17. 29 U. S. C. A. § 160(e).

18. 29 U. S. C. A. § 160(f).

the event of certification of Union as bargaining representative. National Labor Relations Board v. Daniel Construction Co., *supra;* Firestone Tire & Rubber Company v. Samoff, 365 F. 2d 625, 627 (3 Cir. 1966).

We have noted: "Time is a critical element in election cases", and, "[t]his factor explains the refusal of Congress to provide for judicial review of representation disputes *until they result in an unfair labor practice order.*" National Labor Relations Board v. Sun Drug Co., Inc., 359 F. 2d 408, 414 (1966) (emphasis supplied).

Tyler Pipe and Foundry Company v. National Labor Relations Board, 406 F. 2d 1272 (5 Cir. 1969) and National Labor Relations Board v. Howard Johnson Company, 398 F. 2d 435 (3 Cir. 1968), cited by DVA in support of its contention that an evidentiary hearing is required "as a matter of procedural due process in a representation election case," are inapposite here. In *Tyler* the evidentiary hearing issue was presented on a petition for review, and in *Johnson* it was raised in an enforcement proceeding. In *Sun Drug*, too, the evidentiary hearing issue was presented in an enforcement proceeding.

For the reasons stated the District Court's "Order Requiring Obedience to Subpoena Duces Tecum" will be affirmed.

VAN DUSEN, *Circuit Judge*, dissenting.

I respectfully dissent and would reverse the District Court order enforcing the Board's subpoena.

The Board has the authority to require the disclosure of the names and addresses of the employees of DVA, absent a validly adopted rule, only if there has been a proper "adjudicatory proceeding." *N. L. R. B. v. Wyman-Gordon Co.*, 394 U. S. 759, 766 (1969). However, the present record

fails to show that the Board "provide[d] for an appropriate hearing" as required by Congress[1] prior to (a) the issuance of its direction to file an *Excelsior* list before the first election, (b) its similar direction of January 16, 1969, contained in the Supplemental Decision on Objections to Election and Direction of Second Election, and (c) its May 20, 1969, issuance of the challenged subpoena enforced by the District Court order forming the basis of this appeal.

The only hearing granted to the respondent DVA by the Board, which concededly has the duty to weigh "the asserted interest of the employees in avoiding the problems that union solicitation may present,"[2] was the hearing of August 26, 1968. The respondent made clear that it would only agree to provide the addresses (as opposed to the names, which were furnished without challenge) of the employees who consented to that disclosure, relying on the invalidity of the *Excelsior* Rule for the reasons stated in

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1. 29 U. S. C. § 159(c)(1) provides:

"(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented by collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, . . .

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof." See, also, 29 C. F. R. § 102.64. The applicability of this Congressional directive was specifically recognized in the opinion of Mr. Justice Black in *N. L. R. B. v. Wyman-Gordon Co.*, *supra*, at 70-71 and n. 2.

2. See *N. L. R. B. v. Wyman-Gordon Co.*, *supra*, at 767.

Wyman-Gordon Co. v. N. L. R. B., 397 F. 2d 394 (1st Cir. 1968).[3] The petitioning Union answered that it did not want an incomplete list of addresses and that it reserved "its right to demand an Excelsior list with the names and addresses of the employees." (76a). The Hearing Officer then made clear that there had been off-the-record discussions of this problem, but remarked that the recorded statements of each party were "sufficient."[4] From the record thus incompletely transcribed, it is impossible to tell whether the Hearing Officer gave the respondent an opportunity to present the special facts of its situation or whether the Hearing Officer actually considered these facts in rendering his decision.[5]

Prior to and after the first election, originally scheduled for September but postponed to December, the alleged harassment of employees commenced. The respondent requested a hearing concerning this harassment in January 1969 (15a), by its letter of May 6, 1969 (28a-29a), and in its Petition to Revoke Subpoena of May 28, 1969 (22a). If the Board is to require an *Excelsior* list under the allegedly particular facts of this case, I believe that it must grant the respondent its requested hearing. Cf. *N. L. R. B. v. Sun Drug Co.*, 359 F. 2d 408, 414-16 (3rd Cir. 1966); *Tyler Pipe & Foundry Co. v. N. L. R. B.*, 406 F. 2d 1272, 1275 (5th Cir. 1969).

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3. At the time of this hearing, the writ of certiorari had not yet been granted. The writ was subsequently granted on 11/12/68. See 393 U. S. 932.

4. There were several off-the-record discussions before and during the hearing (71a). The Hearing Officer stated (76a-77a):

> "I think that should be sufficient for the record on that. We have had off-the-record discussion on it."

5. Such a decision appears to be contemplated by the Board. For example, in *Excelsior Underwear, Inc.*, 156 N. L. R. B. 1236, 1244 (1966), the Board stated that ". . . if [a union subjects employees to the dangers of harassment and coercion in their homes] . . . we shall provide an appropriate remedy."

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NATIONAL LABOR RELATIONS BOARD

v.

DELAWARE VALLEY ARMAMENTS, INC., AND (INTERVENORS) EDITH BISHOP, EMILIA COMOROTE, ELVA LOVE, DOROTHY PARKS, HELEN REYNOLDS, DONNA RIEBLE, JUANITA RUDOLPH, JENNY TREMPER, ANNA WEBBER AND CAROLYN WERTS, INDIVIDUALLY AND AS REPRESENTATIVES OF A CLASS

DELAWARE VALLEY ARMAMENTS, INC.,
Appellant

(D. C. Civil Action No. 838-69)

Present: KALODNER and VAN DUSEN, *Circuit Judges* and FULLAM, *District Judge*.

ORDER OF SEPTEMBER 3, 1970.

AND NOW, September 3, 1970, after consideration of the Motion To Stay The Mandate, the Opposition to that stay, and the record, it is ORDERED that the mandate shall be stayed for fifteen (15) days from this date, and thereafter provided that appellant files proof with the Clerk of this

court on or before the expiration of such fifteen days that it has filed a petition for a writ of certiorari with the Supreme Court of the United States.

By the Court,

KALODNER,
Circuit Judge.

Dated: September 3, 1970.